

NO. 46914-6

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

NEW VISION PROGRAMS, INC., a Washington Corporation,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent.

AMENDED BRIEF OF RESPONDENT

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I. INTRODUCTION

This is a contract case. While the plain language of the contract's terms is not in dispute, the legal obligation arising under those terms is in dispute. By statute the Department of Social and Health Services (DSHS) may become the legal custodian for severely behaviorally challenged dependent youth and as such has statutory obligations to monitor their placements and assure their safety. DSHS also provides services to those youth and entered into a contract with New Vision Programs, Inc. (New Vision) which required New Vision to provide Behavior Rehabilitation Services when those services were authorized by DSHS. By the contract's terms, DSHS had unconditional authority over whether or not to authorize those services; DSHS' only contractual obligation was to pay for authorized services.

But New Vision wanted more than what was agreed to in the contract. It argues the contract should be read in such a way as to prohibit DSHS from exercising its statutory authority to remove youth so that New Vision could continue to receive the same amount of money that it had in the past. But the contract neither prohibits removal of youth, from nor requires placement at, New Vision facilities; DSHS' authority over placement decisions for youth arises not from the contract but from state statute. Nevertheless, New Vision alleges that DSHS is in breach of the contract for

removing youth and prohibiting placement. New Vision seeks to improperly extend an implied obligation of good faith and fair dealing beyond specific terms in the contract to other acts by DSHS not included in the contract. Because as a matter of law no obligation of good faith and fair dealing existed and no genuine issues of material fact were raised as to whether DSHS breached such an obligation if it did arise, the trial court properly dismissed the lawsuit. This Court should affirm that order.

II. COUNTERSTATEMENT OF FACTS

DSHS is the legal custodian for children who have been removed from their homes due to abuse and neglect. RCW 74.13.031(7). DSHS' authority and obligations to these youth and their families arises from state statute and includes the requirement to monitor their placements and assure their safety. RCW 74.13.031(6). Some of these youth have a high level of service needs—they may be physically or sexually aggressive or behaviorally-disordered—and so DSHS offers a specific type of service called Behavior Rehabilitation Services (BRS). BRS provides temporary intensive supervision and treatment to safely stabilize youth, usually in a group home. Clerk's Papers (CP) 512. DSHS enters into contracts with BRS providers who must be licensed through DSHS' Division of Licensed Resources (DLR) as meeting minimum licensing requirements before DSHS will contract with them. CP 514; RCW 74.15.090.

No terms of the contract between DSHS and New Vision require placement or prohibit removal of youth; instead, the contract is one that merely requires payments for services that are authorized. CP 518-621. That agreement specifically states:

DCFS¹ *may* request services from the contractor on an as-needed basis. This Contract *does not* obligate DCFS to authorize services from the Contractor.

CP 533, ¶ 12. Under this plain language, New Vision did not have a right to have children placed in its facilities nor was DSHS prohibited from removing youth from its facilities. Rather, New Vision only had the right to be paid for authorized services.

In addition to the express language above, additional terms in the contract around the purpose of the agreement and the work to be performed further highlight that this was a contract for services, not placement. On the very first page of the contract, under the heading “Contract Purpose,” the document states:

The Behavioral Rehabilitation Services (BRS) is a temporary intensive wraparound support and treatment program for youth with high-level service needs used to stabilize youth and assist in achieving their permanent plan. Services are intended to:

- Safely keep youth in their own homes with wraparound supports to the family

¹ DCFS is the Division of Children and Family Services, part of the Children’s Administration (CA) within DSHS responsible for child welfare services.

- Safely reunify or achieve alternative permanent plans more quickly
- Safely increase family based care by using a wraparound approach
- Safely reduce length of service by transitioning to a permanent home or less intensive service

CP 518.

Also on the same page under the heading “Contract Maximum” it states “Fee for Service.” CP 518. In Exhibit A of the contract, which is entitled “Statement of Work,” the exact language of the agreement again refers to the services to be authorized and repeats the “Contract Purpose” language from the first page of the agreement. CP 540. In the section on “Consideration” all of the language referring to payment relates to services that have been offered. CP 532.

Beginning in 2008, New Vision was a BRS provider licensed through DSHS that operated four group homes in Washington. CP 512. Although New Vision had at least some periods where no violations of minimum licensing requirements were noted, at other times, DSHS found that New Vision violated minimum licensing requirements. CP 489-92. When this happened, DSHS required New Vision to enter into compliance agreements to correct the violations, which ranged from improper restraint and failure to provide background-check cleared staff, to failure to adequately supervise youth or properly store or provide sufficient food.

CP 495, 497-98, 500-02, 504-06, 509-10. New Vision and DSHS entered into compliance agreements on five occasions: June 2012, November and December 2012, and February and March 2013. CP 495, 497-98, 500-02, 504-06, 509-10. New Vision did not agree with the findings related to the March 2013 compliance agreement, but the business' owner signed the agreement and agreed to fix the violations. CP 491-92.

New Vision was paid for authorized services via annual one-year contracts; the contract at issue here was for the period of July 1, 2012 to June 30, 2013. CP 512. Under its terms, DSHS required New Vision to meet minimum licensing requirements including meeting the basic needs of children, such as providing food, clothing, shelter and incidentals, and meeting BRS Handbook requirements. CP 514. DSHS pays BRS providers the published BRS rate which is in effect at the time that a youth is placed in a BRS home. CP 513-14. In 2013, the BRS provider rates ranged from \$2,661 to \$7,113 per month per youth. CP 623. These rates are paid per youth so New Vision makes more money with each placement. In December 2012 alone, New Vision was paid just over \$168,850.00 for services provided under its BRS contract. CP 514.

These rates are prorated to a daily amount depending on the days that the youth actually receives services. CP 513. Prorating is necessary since youth in BRS placements could move from the providers' facilities

at any time, either because they are returned home by order of the juvenile court, they run from foster care, can be sentenced to juvenile detention, or their placement is otherwise changed in order to meet their significant needs. CP 513. The unconditional authority over when to authorize services provides DSHS flexibility to only pay providers when youth are present at the facilities and those providers are actually providing BRS services. CP 513.

In April 2013, DSHS contract program managers, licensing staff and BRS program staff conducted a comprehensive review of all aspects of New Vision's programs. CP 492, 514. As a result of this comprehensive review, DSHS concluded that the majority of the children placed in New Vision facilities were not safe and that New Vision continued to violate minimum licensing requirements, as well as the requirements of the contract and the BRS program. CP 342-43, 492-93, 514-15. The department removed youth from three of four New Vision facilities in April and May 2013. CP 493, 516. New Vision was specifically notified that youth were being removed under DSHS' statutory authority as custodian. CP 346. Services continued to be authorized until June 28, 2013 for older youth residing in the New Vision facility without violations. CP 344, 709-10. The contract expired on June 30, 2013 and DSHS elected not to renew it. CP 709-10.

In January 2014, DSHS moved for summary judgment as to all four claims in the complaint; that motion was granted as to three of the four claims. CP 466-86; CP 776-77. The trial court granted New Vision's CR 56(f) motion for additional time to conduct discovery on the issue of good faith performance of the contract terms. CP 774-75. DSHS refiled its summary judgment motion alleging that New Vision could not establish any breach of the contract because:

- No express terms of the contract required placement or prohibited removal of youth and,
- No obligation of good faith and fair dealing arose because DSHS retained unconditional authority over whether to authorize services.

CP 624-40.

In response, New Vision argued that questions of fact existed around whether DSHS breached the obligation of good faith and fair dealing that arose first, through "DSHS' exercise of discretion" and, second, through specific contract terms related to suspension of performance, corrective action plans, length of stay and termination. CP 641-52. In addition to its arguments above, in reply DSHS argued that the contract's terms could not be expanded to imply a duty prohibiting removal or requiring placement and that New Vision presented no genuine issues of material fact as to breach. CP 712-22. The trial court granted summary judgment. CP 763-64. This appeal followed. CP 765.

III. ARGUMENT

No genuine issues of material fact exist about whether DSHS breached an express term in the contract because no express terms required placement at or prohibited removal from New Vision facilities. The express terms of the contract only required payment for services rendered, and it specifically reserved to DSHS unconditional authority over whether to authorize BRS services. Because the contract gave the department unconditional authority whether or not to authorize BRS services, by operation of law no implied obligation of good faith and fair dealing arose. This unconditional authority over the authorization of services provides flexibility that is critical to DSHS' legal obligation as custodian to properly serve these high needs youth while being a good steward of public funds.

As a matter of law, any implied duty of good faith and fair dealing attaches only to specific contract terms within the agreement. It does not arise, where, as here, a party to the contract is exercising non-contractual discretion based on a separate statutory obligation. Only when a party has discretion about how to perform a specific *contract* term does an obligation arise to act in good faith. But even if a duty of good faith is implied in the specific terms of a contract, it is a duty to do in good faith the thing that is the subject of the term, and not a duty to refrain from

doing something else about which the identified term is silent. In responding to DSHS' motion for summary judgment, New Vision had the burden to show that there was a legal obligation that existed under the contract and that genuine issues of material fact existed as to whether DSHS breached the obligation in the contract. New Vision failed to do either. The trial court appropriately granted summary judgment. This Court should affirm.

A. The Trial Court's Grant Of Summary Judgment Is Reviewed *De Novo*

This Court reviews a trial court's grant of summary judgment de novo. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Atherton Condo. Apartment-Owners Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 515-16, 799 P.2d 250 (1990)). The court will affirm a grant of summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Vallandigham*, 154 Wn.2d at 26. Facts are considered in the light most favorable to the nonmoving party and summary judgment is affirmed if, based on all of the evidence, reasonable persons could reach

but one conclusion. *Id.* The moving party has the burden of showing that there is no genuine issue as to any material fact. *Id.*

“A party may move for summary judgment by setting out its own version of the facts or by alleging that the nonmoving party failed to present sufficient evidence to support its case.” *Pac. Nw. Shooting Park Ass’n v. City of Sequim*, 158 Wn.2d 342, 350, 144 P.3d 276 (2006) (citing *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689 (1993)). “If the moving party uses the latter method, it must ‘identify those portions of the record, together with the affidavits, if any, which . . . demonstrate the absence of a genuine issue of material fact.’” *Id.* at 350-51 (alteration in original) (quoting *Guile*, 70 Wn. App. at 22). “Once the moving party has met its burden, the burden shifts to the nonmoving party to present admissible evidence demonstrating the existence of a genuine issue of material fact.” *Id.* at 351 (citing *Vallandigham*, 154 Wn.2d at 26). “If the nonmoving party cannot meet that burden, summary judgment is appropriate.” *Id.*

Here, New Vision alleged that under the contract DSHS had a legal obligation not to remove youth and that obligation was breached when DSHS did so. But New Vision failed to establish that the contract required placement or prohibited removal of youth. New Vision failed to establish that the non-contractual discretion DSHS is required to exercise

by state statute as a youth's legal custodian to determine where a youth would be placed, gave rise to a *contractual* obligation to act in good faith. Finally, New Vision failed to present evidence of genuine issues of material fact that DSHS breached an obligation of good faith and fair dealing with regard to its performance of specific contract terms. Accordingly, the trial court properly granted DSHS' motion for summary judgment. This Court should affirm.

B. New Vision Cannot Establish A Legal Obligation Of Good Faith And Fair Dealing Or That Such An Obligation, Even If Properly Implied, Was Breached

The contract at issue was for the period of July 1, 2012 through June 30, 2013 and it required DSHS to pay New Vision if New Vision provided authorized services. CP 533, ¶ 12. In its complaint, New Vision alleged that removal of youth and the prohibition on placement was a breach:

6.3 DSHS has breached the contract by issuing a stop placement order on Plaintiff's programs and removing children from Plaintiff's homes.

6.4 DSHS has undermined the common purpose of the Contract by issuing a stop placement order on Plaintiff's programs and removing children from Plaintiff's homes.

CP 12.

A plaintiff in a contract action must prove (1) valid contractual obligations between the parties, (2) breach, (3) causation, and (4) resulting damage. *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995). Simply put, "a party seeking to recover on a written contract bears the burden of establishing a right to recover within the contract terms." *W. Wash. Laborers-Emp'rs Health & Sec. Trust Fund v. Merlino*, 29 Wn. App. 251, 255, 627 P.2d 1346 (1981). Interpretation of a contract provision is a question of law where the interpretation does not depend on the use of extrinsic evidence. *Tanner Elec. Co-op., v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996). The determination of what legal consequences flow from contract terms is always an issue of law. *Martinez v. Miller Indus., Inc.*, 94 Wn. App. 935, 943, 974 P.2d 1261 (1999).

Here, summary judgment was properly granted because the terms of the contract are unambiguous and the court can decide the operative legal effect of those terms as a matter of law. New Vision no longer argues, because it cannot, that the failure to place or to remove youth from its facilities was a breach of an express term of the contract. Instead, New Vision first argues that the non-contractual discretion DSHS exercised as the youth's legal custodian to place or remove youth as required by state statute gave rise to an implied obligation of good faith under the contract.

Next it argues that under such an implied obligation some terms in the contract prohibited removal or required placement even though the contract is silent about placement and removal and the specific terms New Vision identifies do not prohibit removal or require placement. But New Vision is wrong on all counts as a matter of law. As a result, the trial court dismissed New Vision's contract claim. This Court should affirm.

1. No Obligation Of Good Faith And Fair Dealing Arises Where, As Here, The Contract Gives DSHS Unconditional Authority To Authorize Services

Instead of identifying an express term that was breached, New Vision attempts to inject new obligations into the agreement by arguing that questions of fact exist regarding whether DSHS violated an *implied* obligation of good faith and fair dealing. But as a matter of law, New Vision's argument fails where DSHS had unconditional authority over whether to authorize services. First, case law is clear that there is no "free floating duty of good faith that is unattached to an existing contract. The duty exists only in relation to performance of a specific contract term." *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177, 94 P.3d 945 (2004).

Importantly, as a matter of law, "there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms[.]" *Badgett v. Sec. State*

Bank, 116 Wn.2d 563, 570, 807 P.2d 356 (1991). Likewise, the duty of good faith and fair dealing “does not inject substantive terms into the parties’ contract.” *United Fin. Cas. Co. v. Coleman*, 173 Wn. App. 463, 295 P.3d 763 (2012). Even in the context of contracts involving the state, the implied duty of good faith and fair dealing applies only in connection with terms in the underlying contract and does not create new obligations. *Fedway Marketplace West, L.L.C. v. State*, 183 Wn. App. 860, 336 P.3d 615 (2014), *review denied*, 182 Wn.2d 1013 (2015).

Last year the Supreme Court decided a case on the implied duty of good faith and fair dealing, *Rekhter v. Department of Social and Health Services*, 180 Wn.2d 102, 323 P.3d 1036 (2014), which dealt with when the duty does and does not arise. There, the court held that a jury properly considered whether DSHS had violated an implied duty of good faith and fair dealing arising out of personal care contracts between DSHS and family members of disabled people. *Id.* While the contracts indicated that there would be a rate and number of hours, the personal care contracts did not contain specifics about how much a family member would be paid to provide care and how many hours would be authorized. *Id.* at 113-14.

Instead, the contract indicated that at a future time DSHS would use a formula to set the specific amounts for the terms related to amount of rates and hours. *Id.* Because the specifics of the terms were not set, and

by agreement DSHS would determine them later, the court held that a jury could consider whether DSHS violated the implied duty of good faith and fair dealing in the manner in which it went about “setting and performing that contractual term.” *Id.* at 115.

Despite New Vision’s claim that these contracts are similar, they are actually quite different. One key distinction between this case and *Rekhter* is that here there is a term in the contract that gave to DSHS unconditional authority not to do the very thing that is the subject of the contract: authorize services. CP 533, ¶ 12. It states:

DCFS may request services from the Contractor on an as-needed basis. This Contract does not obligate DCFS to authorize services from the Contractor.

CP 533, ¶ 12.

This is critically important. The law treats contracts which set terms about hours and rates but leave for a later time a discretionary process to determine specific amounts different from those contracts that give a party the sole authority over performance of a term. *Rekhter*, 180 Wn. 2d at 113-14. In the latter type of contract, there is no duty of good faith and fair dealing to imply. *Id.* at 120 (citing *Johnson v. Yousoofian*, 84 Wn. App. 755, 930 P.2d 921 (1996)). The court distinguished the two types of contracts by stating that “the duty of good faith ‘exists only in relation to the performance of specific contract terms and does not

obligate [a] party to accept new obligations.” *Id.* In *Youssoofian*, a landlord was sued by his tenants because he refused to agree to allow the tenants to assign the lease to someone else. 84 Wn. App. at 756-59. His defense was based on a provision in the contract that stated he was not required to give consent to such an assignment. *Id.* The court held in the landlord’s favor; the landlord could not be said to violate the obligation of good faith and fair dealing by not agreeing to assignment because nothing in the contract required him to do so. *Id.* at 762. The implied covenant is “derivative” and “applies only to performance of specific contract obligations” that are already contained in the contract. *Id.* In short, if there is no obligation to do something, there is nothing to be performed (or not) in good faith. *Rekhter*, 180 Wn.2d at 116 (citing *Youssoofian*, 84 Wn. App. at 762-63).

Applying that rationale to this case, there is similarly no implied duty of good faith and fair dealing in the contract term regarding authorized services. The contract here states:

DCFS may request services from the Contractor on an as-needed basis. This Contract does not obligate DCFS to authorize services from the Contractor.

CP 533, ¶ 12.

Under this specific language, DSHS had no obligation to authorize services. As such, there was nothing for DSHS to do (or not do) in good

faith. If no implied obligation of good faith and fair dealing arose as a matter of law, the department cannot be in breach. Accordingly, the trial court decision should be upheld and the case must be dismissed.

2. Nothing In The Contract Limited DSHS' Statutory Decision Making About Placement Or Removal Of Youth And So No Obligation Of Good Faith and Fair Dealing Arises

New Vision argues that because DSHS had general discretion about placement and removal of youth, questions of fact exist on whether DSHS breached an implied duty of good faith and fair dealing. Again, New Vision identifies no terms in the contract that required placement or prohibited removal. Instead, without citation to authority, New Vision frames the argument like this: “because the Contract did not impose such an obligation, Respondent had discretionary authority to determine when children would be placed Such discretion implicates the duty of good faith and fair dealing.” Br. of Appellant at 10 (emphasis added).

But the argument that the obligation of good faith and fair dealing is “implicated” because DSHS had discretion misunderstands how the obligation actually arises in contracts. The duty of good faith and fair dealing does not arise when one party has non-contractual discretion based on a statutory obligation to act in ways unrelated to the specific requirements in the terms of a contract. Rather, the duty arises when the

contract gives discretionary authority to determine a specific contract term. *Goodyear Tire & Rubber Co. v. Whiteman Tire*, 86 Wn. App. 732, 738, 935 P.2d 628 (1997). Inherent in this analysis is that there is a term that has been decided but that one party holds the ability as to how to determine and then fulfill that term. The reason that the contract in *Rekhter* gave rise to an obligation of good faith and fair dealing is because in those contracts, DSHS and the care providers agreed to terms which would be determined in the future, and it was the fulfillment of those terms to which the good faith obligation attached. *Rekhter*, at 113-14. It is not that a party may have general discretion to act in some way related to the contract; it is that one party had discretion specifically related to fulfilling a term in the contract that existed but was not yet final from which the obligation of good faith and fair dealing arises.

No such terms exists in the BRS contract between DSHS and New Vision. Not only is the contract silent as to placement and removal, it gives DSHS unconditional authority over whether to do the very thing that the contract is meant to effectuate: the delivery of and payment for authorized services. This is at least in part because of DSHS' role as legal custodian to those dependent youth who were placed in New Vision facilities.

Without unconditional authority over whether to authorize services, the contract could be read to dictate youth service needs, or as New Vision demands here, require placement when DSHS has determined placement is not appropriate. But again, DSHS' obligations to youth, and any discretion that it exercises, stem from the statutory obligation to act on behalf of the youth in its custody. RCW 74.13.031(6), (7). Any number of situations could result in removal of youth with little or no notice due to each youth's individual situation: being hospitalized, going on the run, running away, being placed in juvenile detention, or returning home. Further DSHS must balance these needs while acting as good stewards of the public purse and paying only for services which are actually being provided. The exercise of discretion granted in statute to DSHS as a youth's legal custodian to make decisions regarding placement does not, as a matter of law, give rise to an obligation of good faith and fair dealing under the contract. This is because the implied obligation relates only to specific contract terms and the contract here is silent about placement and removal. New Vision's claim that the implied duty arises fails as a matter of law. The order of the trial court should be affirmed.

3. The Contract Term On Investigation Of Contractor Did Not Prohibit DSHS From Issuing A Stop Placement And Removing Youth From New Vision Facilities And So No Breach Occurred When It Did So

In April 2013, DSHS made a decision to no longer place youth at New Vision facilities. CP 344, 346. This is referred to at the agency as a “stop placement.” CP 344. The authority for that decision is DSHS’ statutory obligation as youth’s legal custodian under RCW 74.13.031. This exercise of discretion is not grounded in any term of the contract because, as noted above, this was a contract that required DSHS to pay only for authorized services which neither prohibited removal nor required placement. CP 533, ¶ 12.

Misunderstanding the law as it relates to the implied obligation of good faith and fair dealing, New Vision argues that the decision by DSHS to stop placement of youth in New Vision facilities also breached an implied duty of good faith arising out of the contract. Br. of Appellant, at 13-14. In support of that claim, New Vision points to the term about “Investigation of Contractor” and argues that term created an obligation to act in good faith that prohibited DSHS from stopping placement at, or removing youth from, New Vision facilities. That term states:

21. Investigation of Contractor or Related Personnel

DSHS may, without prior notice, suspend the Contractor’s performance of the Contract if the Contractor [or others

related to the Contractor] is investigated by DSHS or a local, county, state or federal agency regarding any matter that, if ultimately established, could either:

- a. Result in a conviction . . . , or
- b. In the sole judgment of DSHS, adversely affect the delivery of services under this Contract or the health, safety or welfare of DSHS clients.

DSHS may also take other lesser action, including but not limited to, disallowing the subject of the investigation, whether a staff member, employee, volunteer or [others associated with the business] from providing services, or from having contact with DSHS clients, until the investigation is concluded and a final determination made by the investigating agency.

CP 535, ¶ 21.

New Vision would have this Court imply a good faith obligation prohibiting stop placement into a contract term called “Investigation of Contractor or Related Personnel.” But, as a matter of law, the implied duty of good faith and fair dealing cannot be used to expand the requirements under the contract. *See Badgett*, 116 Wn.2d at 569; *Rekhter*, 180 Wn.2d at 112. Here, any implied legal duty to act in good faith is limited to whether good faith was exercised in relation to “Investigation of Contractor or Related Personnel”—the subject of the term in question—not stop placement, which is a different action altogether that is grounded in DSHS’ statutory authority as legal custodian. New Vision fails to

establish that an obligation of good faith related to this term prohibited the removal of youth or required placement as a matter of law.

In addition, New Vision failed to establish genuine issues of material fact that DSHS was in breach. It presented no evidence that a “stop placement” suspended performance of its contract. To the contrary, the undisputed evidence is that DSHS never suspended New Vision’s performance under the BRS contract. CP 709. Indeed, New Vision continued to provide authorized services and to be paid for authorized services until right before the contract expired. CP 709-10. Five youth remained in one of New Vision’s facilities, with the last youth leaving on June 28, 2013. CP 710. New Vision’s real issue is that in the later months of the period in which the contract was in effect, it made less money than it had previously. But the contract contained no guaranteed amounts, monthly minimums or other requirements about payment. CP 518. New Vision was only to be paid for authorized services and DSHS was not required to authorize services. CP 533, ¶ 12. The undisputed evidence is that DSHS did not suspend performance and as a result New Vision cannot establish breach of the term on “Investigation of Contractor or Related Personnel” even if a duty of good faith is implied.

4. No Legal Obligation Can Be Implied And No Evidence Of Breach Exists Because DSHS Performed The Term On Corrective Action Plans As Required

New Vision's next allegation is that an implied obligation of good faith and fair dealing arose regarding corrective action plans. Br. of Appellant at 15-16. It argues that because a Corrective Action Plan was in place, DSHS had an implied duty of good faith and fair dealing under that contract term not to take any other action related to it. But the plain meaning of the contract term imposes no such limitation. It states:

23. Compliance with Corrective Action Plan

In the event that DSHS identifies deficiencies in Contractor's performance under this Contract, DSHS may, at its option, establish a Corrective Action Plan. When presented with a Corrective Action Plan, Contractor agrees to under take the actions specified in the plan within the timeframes given to correct the deficiencies. Contractor's failure to do shall be grounds for termination of this Contract.

CP 535, ¶ 23.

The contract allows DSHS to require a corrective action plan, which DSHS did on five occasions because New Vision failed to meet minimum licensing requirements. CP 495, 497-98, 500-02, 504-06, 509-10. But nothing in the plain language imposes an additional limitation on DSHS' legal authority to undertake other action that may be permitted by policy or statute that is outside the scope of the contract's obligations.

Furthermore, nothing in this term limits DSHS' ability to remove youth from a facility. New Vision provides no authority for the limitation it seeks to impose, except to say that where there is discretion the obligation of good faith and fair dealing is implied.

But as argued above, that implied obligation has limits and those limits relate to what is required by the specific terms of the contract for which the parties bargained. Nothing in this contract term itself, or under an implied obligation of good faith and fair dealing, prohibited DSHS from exercising its statutory obligation as youths' custodian from making decisions about youths' welfare. *See Badgett*, 116 Wn.2d at 569; *Rekhter*, 108 Wn.2d at 113. New Vision failed to establish that a good faith obligation arose from this specific contract term.

Any obligation that did arise related solely to the plain language of the term. And as to that term's requirements, New Vision also failed to establish a breach. DSHS performed as permitted under the terms on corrective action plans when it required New Vision to enter into a corrective action plan. CP 495, 497-98, 500-02, 504-06, 509-10. In fact, DSHS staff repeatedly offered New Vision numerous opportunities to fix its deficient performance. CP 487-510. To the extent there is an implied obligation of good faith, it related to the creation and execution of a corrective action plan, something that DSHS did repeatedly. New Vision

presented no evidence that DSHS failed to perform what was required under the term. Because New Vision failed to establish a legal duty or, even if there was one, that it was breached by DSHS, the trial court properly dismissed the complaint. This Court should affirm that order.

5. The Contract Term On Length Of Stay Did Not Prohibit DSHS From Removing Youth From New Vision Facilities And So No Breach Occurred When It Did So

New Vision next turns to the Statement of Work which outlines the contractor's obligation to develop a service plan including a length of stay to argue DSHS breached the contract by removing youth. Br. of Appellant at 17. The Statement of Work states:

3. Statement of Work – Exhibit A: The contractor shall provide services and staff as described in the Statement of Work attached as Exhibit A.

It goes on to outline how DSHS and the contractor will work together to identify a “Length of Stay:”

9. Length of Stay

Length of stay will be based on the individual needs of the youth and may not exceed the term of 12 months, unless approved in writing by the CA² Regional Administrator or designee.

Seeking this approval is a CA responsibility. The Contractor and CA shall mutually agree and establish a targeted exit date for a child to transition from BRS. This agreed upon targeted exit date shall not exceed 12 months

² CA is Children's Administration, the administration within DSHS responsible for child welfare.

from the child's entry date. This mutually agreed upon exit date should be determined at the child's initial case staffing meeting, held within 30 days of entry.

CP 543, ¶ 9.

On its face the plain language of the term requires only that the parties to the contract work cooperatively to establish a service plan with an end date within 30 days of the youth's arrival. Any obligation of good faith and fair dealing that would be implied can relate only to that term and the work to be performed to develop a service plan with an end date within 30 days of the youth's arrival at the facility. *Badgett*, 116 Wn.2d at 569; *Rekhter*, 108 Wn. 2d at 113. As a matter of law, a term that requires parties to develop a service plan with an end date within 30 days of arrival cannot be expanded to prohibit DSHS from exercising its unconditional authority to authorize services or to act as legal custodian making decisions about placement under statute.

Under RCW 74.13.031, DSHS has placement and care authority for dependent youth including all the youth to whom New Vision was authorized to provide services. Subject only to court orders issued by the juvenile court, DSHS, as the legal custodian, has sole authority regarding placement. It makes those decisions based on ever changing circumstances that arise due to individual needs, like involuntary mental health treatment, youth acts, like running away or being placed in

detention and decisions of the juvenile court, including returning youth to their parents. New Vision has supplied no legal authority to expand DSHS' contractual obligation under this contract term or limit DSHS' ability to fulfill its statutory duty.

In addition to failing to establish that the term identified above gave rise to an implied duty, New Vision presented no evidence that DSHS failed to meet with staff to develop service plans with an end date within 30 days of a youth's arrival at the facilities. That is what is required by this term and nothing more. Without evidence that DSHS failed to meet with New Vision as contemplated by that term's plain language, New Vision cannot establish a breach.

While New Vision claims that DSHS failed to follow a provision of the Washington Administrative Code (WAC) about notice prior to removal except in the case of an emergency, it provides no legal authority for how such failure constitutes a breach of the *contract*. DSHS does not concede that it failed to follow the WAC's provisions. But even if it did, New Vision has provided no legal authority to establish that it is entitled to any remedy or that the remedy would be a breach of the contract. A contract breach is the failure to do something that was required in the contract. *Owens v. Harrison*, 120 Wn. App. 909, 915, 86 P.3d 1266 (2004). New Vision failed to establish a legal duty or present evidence of

breach. Because of this, the claim fails and this Court should affirm the order of the trial court.

6. DSHS Continued To Perform Under The Contract Until Right Before Its Expiration And So There Was No Breach

Finally, New Vision claims that questions of fact exist about whether DSHS breached an implied obligation of good faith and fair dealing because it did not terminate the contract. Br. of Appellant at 18. But DSHS had no legal obligation to terminate the contract. As noted multiple times above, this was a contract that required DSHS to pay for services that were authorized. CP 533, ¶ 12. DSHS continued to authorize services under the contract for some youth who remained at one New Vision facility until just two days before the contract period ended on June 30, 2013. CP 344, 709-10. The contract remained in force and effect, under the same terms that had always existed until right before it expired. CP 709-710.

New Vision's real complaint is that it was not receiving as much money as it had in prior months and so alleges breach. Under the contract New Vision was paid the BRS rate per youth, so each time a youth left a facility for whatever reason, New Vision lost money. But a guaranteed, continuous or set amount based on historical dealings was not what was required in the contract. Rather the parties agreed to a term that stated

DSHS was not required to authorize services. CP 533, ¶ 12. The duty of good faith and fair dealing cannot be implied to expand an obligation that is not present in the contract. *Badgett*, 116 Wn.2d at 539; *Rekhter*, 108 Wn. 2d at 113. As a matter of law, no obligation of good faith and fair dealing can be implied. The claim also fails because New Vision failed to present evidence of breach. The unrebutted evidence is that the contract remained in effect, with New Vision being paid for those services that were authorized, until right before the contract expired. CP 709-10. The trial court properly granted summary judgment and this Court should affirm.


IV. CONCLUSION

DSHS did not violate the express terms of the contract. No obligation of good faith and fair dealing arose because here the parties bargained for a term that gave DSHS sole authority to determine when to authorize, or not authorize, services. The exercise of statutory discretion unrelated to specific contract obligations does not give rise to an implied duty of good faith and fair dealing; such an obligation only relates to performance of specific contract terms. No legal duty to act in good faith as to placement or removal of youth arose out of the other terms to which New Vision points. The undisputed evidence is that DSHS performed as

required under the contract and so was not in breach. The trial court properly granted summary judgment and this Court should affirm.

RESPECTFULLY SUBMITTED this 19th day of June, 2015.

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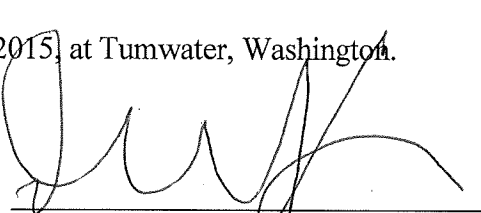
PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record by U.S. Regular Mail on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 19 day of June, 2015, at Tumwater, Washington.



MELISSA KNIGHT, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

June 19, 2015 - 1:25 PM

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